RECENT DECISIONS.

ADMINISTRATIVE LAW—ELECTIONS—LEGISLATIVE REGULATIONS. A statute provided among other things, that votes should be cast within booths prepared for that purpose, and that a judge of election should put his initials in writing on the back of the ballot. *Held*, both the votes cast outside of the booths and those which failed to have the initials of the election judge on the back thereof in writing cannot be counted. *Choisser* v. *York* (Ill. 1904) 71 N. E. 940. See NOTES, p. 55.

ADMINISTRATIVE LAW—POLITICAL PARTIES—RIGHT OF COURT TO REVIEW DECISIONS OF STATUTORY TRIBUNAL. Two factions of the same political party held rival conventions. Each having nominated a complete state ticket claimed to be regular and hence entitled to have the names of its nominees printed on the ballots under the official party emblem. A state statute provided that, in cases of disputes between factions of a party, the Secretary of State should "give preference in designation" in certifying names for the official ballot to the nominees of the convention "certified by the committee which had been officially certified to be authorized to represent the party." The State Central Committee, which answered to the statutory description, had acted and the relator's attempt to have its action set aside on the ground that the members of that committee, being affiliated with the opposing faction were disqualified. *Held*, interest will not disqualify the State Central Committee from acting and when it has once acted its decision is not reviewable by the courts. *State* ex rel. *Cook* v. *Houser* (Wis. 1904) 100 N. W. 964. See NOTES, p. 52.

ADMIRALTY—ACTION IN REM—COUNTERCLAIM IN PERSONAM. The plaintiffs brought an action in rem for salvage. The defendant set up a counterclaim for demurrage, under a charter party agreement, which counterclaim the plaintiff attempted to have stricken out. *Held*, since the judge before whom the case appeared was a judge of the High Court of Justice, to which court admiralty jurisdiction had been transferred, it was a matter for his discretion, subject to review, as to whether or not he would allow the counterclaim. *The Cheapside* [1904] P. 339.

By the Judicature Act of 1873 the Admiralty Court as a separate institution ceased to exist, and its jurisdiction was included in the jurisdiction of the High Court of Justice. S. C. Jud. Act. 1873, § 16. By the same act a judge of the High Court was given power to allow counterclaims at his discretion to the same extent as if the defendant were bringing a separate action. S. C. Jud. Act 1873, § 24 sub. 53. See also Order XXIX, r. 3, Wilson Pract. S. C. Jud. p. 203, 7th ed. Statutory enactments blending various jurisdictions do not change the essential character of those jurisdictions. An action in rem for salvage is always a matter of admiralty law and retains its character in much the same manner as would an action at law where equitable defenses are allowed by statute. There is no inherent difficulty in allowing counterclaims to be set up which arise under a different jurisdiction from that of the original action when the jurisdictions involved have been merged. The principal case illustrates the trend of modern methods of procedure.

BANKRUPTCY—PARTNERSHIP AND INDIVIDUAL CREDITORS. E. B. Corcoran, doing business as the Crescent Buggy Co., made an assignment for the benefit of creditors. Certain claims were filed by creditors of Junker & Corcoran, an insolvent firm, having no assets, of which the bankrupt was a member. *Held*, under the Bankruptcy Act, [U. S. Comp. St. 1901, p. 3424], the separate creditors of the bankrupt should first be satisfied. In re *Corcoran* (C. C., S. D. Ohio, 1904) Ohio Law Bull. Nov. 14, 1904.

The decision fails to give effect to an exception to the general rule clearly recognized before the statutory declaration of the general rule, and in the absence of a legislative declaration it would seem that this exception should be maintained. See 4 COLUMBIA LAW REVIEW 595.

CARRIERS—PASSENGERS. A street-car of the defendant company had been stopped on signal of the plaintiff. As the plaintiff neared the car with the purpose of entering, he was injured by the sign falling from the car. *Held*, the relation of carrier and passenger had not commenced. *Duchemin* v. *Boston El. Ry. Co.* (Mass. 1904) 71 N. E. 780. See NOTES, p. 53.

CONSTITUTIONAL LAW—ALIENS—RIGHTS OF CHINESE WITHIN THE UNITED STATES. The defendant, a Chinaman of reputable character had lived in the United States for nineteen years. He was proprietor of two laundries, in one of which he worked from time to time. He claimed he had entered with proper papers, which he had lost. *Held*, the proof did not show that he was a laborer and his good faith and long residence raised a presumption that he was entitled to remain. *U. S.* v. *Kol See* (D. C. S. D. Ga. 1904) 132 Fed. 136.

The Act of Nov. 3, 1893 c. 14, sec. 2, defines a merchant as "one buying and selling merchandise and none other," and among laborers are included laundrymen. It would seem difficult to distinguish the defendant here from one of the class designated as laborers. The right of any Chinese laborer to residence here, depends upon his possession of a certificate conformable to law. Act of May 6th, 1892, c. 60, sec. 6; *U. S.* v. *Foong Ching* (1904) 132 Fed. 107.

CONSTITUTIONAL LAW—ELECTIONS—NAMES OF CANDIDATES ON BALLOT MORE THAN ONCE. The relator, having been nominated by a regular political party and also by a petition of electors, demanded that his name be placed twice upon the official ballot. The Revised Code of 1899, § 491, prohibits the printing of the name of a candidate in more than one column of the official ballot but gives the candidate his choice. *Held*, mandamus would not lie, as the provision of the code was constitutional, it being a reasonable regulation. *State* ex rel. *Fisk* v. *Porter* (N. D. 1904) 100 N. W. 1080.

For the discussion of a case decided under a similar statute, see 3 COLUMBIA LAW REVIEW 51.

CONSTITUTIONAL LAW—JURY TRIAL—PETTY OFFENCES. The plaintiff in error was prosecuted for receiving for sale oleomargarine not stamped according to law. He was tried by the court without a jury, convicted and sentenced to pay the statutory penalty of $50.00. *Held*, such a conviction was constitutional. *Schick* v. *U. S.* (1904) 195 U. S. 65. See NOTES, p. 48.

CONSTITUTIONAL LAW—POLICE POWER—HEALTH REGULATIONS. A provision of the Tenement House Act required owners of tenements to substitute a sewerage system different from that in use at the time of the adoption of the act. The defendant attacked the constitutionality of the statute on the ground that the cost of changing the plumbing would equal her equity in the property. *Held*, the statute is constitutional, and in considering the reasonableness of the expense imposed the court will take into account the full market value of the property rather than its value above incumbrances. *Ten. House Dept. of New York* v. *Moeschen* (1904) 179 N. Y. 325.

For a discussion of the case here affirmed as decided in the Appellate Division of the N. Y. Supreme Court, see 4 COLUMBIA LAW REVIEW 299; 89 App. Div. 526.

CONSTITUTIONAL LAW—RIVER BOUNDARIES—CONCURRENT JURISDICTION. The plaintiff sued in Kentucky on a judgment obtained in Indiana. The defendant pleaded the invalidity of the service of summons in the first

instance, contending that, under the Virginia compact of 1789 and the Act of Congress Feb. 4, 1791, c. 4, 1 Stat. 189, Indiana courts had no jurisdiction over the Ohio river, the defendant being on the river when served. *Held*, the service was valid and the judgment of the Indiana court was entitled to full faith and credit in the courts of Kentucky. *Wedding* v. *Meyler* (1904) 192 U. S. 573.

The compact provided that "the respective jurisdictions * * * of the proposed state [Kentucky] * * * shall be concurrent only with the states which may possess the opposite shores of the said [Ohio] river." The Kentucky court ruled that the compact contemplated a limitation not a future grant; that, unless there is an express stipulation to the contrary, the jurisdiction of all states is limited to their territorial boundaries; and that whatever concurrent jurisdiction Indiana had was legislative for regulating navigation. The Supreme Court reached a different conclusion as to all the points, following in this holding, prior decisions by state courts, and the provision of the Indiana state constitution. Ind. State Const., Art. 14, sec. 2; *State* v. *Plants* (1884) 52 Am. Rep. 211; *Carlisle* v. *State* (1869) 32 Ind. 55. The case of *Mississippi, etc., R. Co.* v. *Ward* (1862), 2 Black 485 is distinguished on the ground that jurisdiction on the river does not extend to permanent structures attached to the river bed and within the boundary of one or the other state.

CONSTITUTIONAL LAW—UNJUST DISCRIMINATION—POLICE POWER. An act of the legislature regulated the appointment of engineers, flagmen, and conductors on certain steam railroads, by prescribing the precise time and experience necessary to allow one to be employed under its provisions. Rev. Stat. of Ohio, § 3365-11. In an action brought to recover a penalty for a violation of the act, its constitutionality was put in issue. *Held*, the act is unconstitutional in that it arbitrarily creates a class distinction, nor is it saved by a plea of police power. *Cleveland, etc., R. Co.* v. *Ohio* (1903) 26 Ohio Law Bul. 348.

It is difficult to lay down any general rule which will give an adequate test of what is and what is not class legislation. Legislation which selects particular persons from a class and imposes upon them special duties and burdens from which others of the same class are exempt is unconstitutional. Cooley, Const. Limitations, p. 557. See also *State* v. *Grosett* (1901) 65 Ohio St. 289. Any act clearly arbitrary and against the common welfare with respect to classifying persons and their rights is unconstitutional. *Harmon* v. *State* (1902) 66 Ohio St. 249. Under this rule such an act would also be beyond the police power, for it would not look to the public welfare or safety. Though a determination of such a question is often a delicate one, the court in the principal case seems to have decided correctly.

CONTRACTS—AGREEMENT TO GIVE SATISFACTION. The A company contracted to furnish certain mill machinery to the B company under a provision that all of the machines should be to the full satisfaction of the officers of the B company as to quality of work and life and durability of the machines before payment would be required. *Held*, the dissatisfaction of the B company's officers in good faith, though unreasonable, was a defence to an action on the contract. *Inman Mfg. Co.* v. *Amer. Cereal Co.* (Ia. 1904) 100 N. W. 860. See NOTES, p. 56.

CONTRACTS—ASSIGNMENTS—EFFECT OF A DOUBLE ASSIGNMENT. A statute provided that no assignment of wages should be valid against any other persons than the parties thereto unless properly recorded. Two assignments of wages were made by the same person to two different persons, each dated the same day, against the same employer, covering the same period of time, embracing the same services and recorded in the same town at the same hour and minute. In an action by one of the assignees against the debtor it was *held*, that as the object of the statute was to prevent the employer from being liable to pay twice the debt due the assignor, both assignments are void. *Whitcomb* v. *City of Waterville* (Me. 1904) 58 Atl. 68.

At common law there are two well defined rules as to which of successive assignees of a chose in action will prevail, the English rule, followed in some American jurisdictions, that he who first gives notice to the debtor will be preferred, provided he have no notice of a prior assignment. *Dearle* v. *Hall* (1823) 3 Russ 1; *Laclede Bank* v. *Schuler* (1896) 120 W. S. 511; and the distinctively American doctrine, that the prior assignee will prevail, irrespective of notice to the debtor, on the ground that after the assignor has once assigned he has nothing left to pass to a subsequent assignee. *Kennedy* v. *Parke* (1864) 17 N. J. Eq. 415; *Fairbanks* v. *Sargent* (1887) 104 N. Y. 108. The statute in the principal case changed the common law rules only as to the validity of assignment against third parties. The recording would have protected the actual prior assignment. There is no reason apparent why the court in the principal case should not have admitted more particular evidence to show which assignment was valid according to the common law doctrine obtaining in that jurisdiction. See 3 COLUMBIA LAW REVIEW 581.

CORPORATIONS—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—DE FACTO CORPORATIONS. A charter provided that a corporation should not have power to do business until certain conditions were performed. Before having complied, the corporation brought an action in the federal court against the defendant for the price of goods supplied, setting forth diversity of citizenship as the ground of federal jurisdiction. *Held*, the court did not have jurisdiction, as the corporation must have a de jure existence in order to be a citizen in this regard. *Gastonia Cotton M. Co.* v. *Wells Co.* (C. C. A., 4th Circ. 1904) 128 Fed. 369.

The question whether a de facto corporation is entitled to standing in a federal court as a citizen does not seem to have been directly raised. In *Tulare Irrigation District* v. *Shepard* (1901) 185 U. S. 1 and in *Commrs.* v. *Bolles* (1876) 94 U. S. 104, where the action was against the corporation, the court decided against the de facto corporation without looking into the question of jurisdiction. The principal case seems inconsistent with the above cases, for if the view therein set forth be adopted, the court in these cases should have disallowed the action. The record would show the absence of jurisdiction, of which fact the court should take notice. *Grace* v. *American Central Ins. Co.* (1883) 109 U. S. 278. This view seems to be the logical one.

CRIMINAL LAW—DEFENCE OF INSANITY. The defendant was indicted for killing with malice aforethought. On the trial, the killing having been proved, the defense of insanity was interposed. *Held*, that while the presumption of sanity relieves the state at the outset from proof of mental condition, the duty of the state to make out its case fully will require such proof where that fact is brought in issue by the defence. *People* v. *Spencer* (1904) 179 N. Y. 408.

For a discussion of the principles involved in this case, see 4 COLUMBIA LAW REVIEW 507.

DOMESTIC RELATIONS—DIVORCE—CROSS-PETITION. An action for divorce was brought by a wife, resident within the jurisdiction, against a non-resident husband. The defendant appeared personally and filed a cross petition for divorce. The trial court dismissed the petition and then dismissed the cross-petition for want of jurisdiction. Upon appeal by the defendant, it was *held*, the statute requiring a period of residence before filing a petition for divorce did not prevent a non-resident from filing a cross-petition and that the appeal would be sustained. *Pine* v. *Pine* (Neb. 1904) 100 N. W. 938.

The court in the principal case having jurisdiction over the parties would do full justice upon the merits of the issues. It will not compel obedience by the defendant and, at the same time, deny him affirmative relief. This seems to be a reasonable construction of a statute denying divorce to non resident petitioners. *Fullmer* v. *Fullmer* (1878) 6 Week. Dig. 22; *Clutton* v. *Clutton* (1896) 108 Mich. 267; *Sterl* v. *Sterl* (1878)

2 Ill. App. 223. Massachusetts reaches the same result by a different process of reasoning. *Watkins* v. *Watkins* (1883) 135 Mass. 83. Rhode Island and California interpret the statute strictly. *Volk* v. *Volk* (1894) 18 R. I. 639; *Coulthurst* v. *Coulthurst* (1881) 58 Cal. 239. The purpose of the residence clause being simply to limit the number of divorce suits, the liberal interpretation seems preferable.

DOMESTIC RELATIONS—GUARDIANS—LIABILITY OF ESTATE OF INFANT FOR ATTORNEY'S FEES. The plaintiff, an attorney, rendered services under a contract with a guardian of an infant's estate, being appointed attorney by an order of a court of record at the request of the guardian. The infant died before becoming of age and the plaintiff brought suit against the infant's estate for the reasonable worth of his services. *Held*, that he could not recover. *McKee* v. *Hunt* (1904) 142 Cal. 526.

A guardian cannot by his general contracts bind the estate of his infant ward, and even in equity the estate of the infant is not bound by a contract for necessaries made by the guardian. *Reading* v. *Wilson* (1884) 38 N. J. Eq. 446. Where services have been rendered to an executor in the interests of his estate a recovery cannot be had against the estate, but must be sought against the executor personally. *Kowing* v. *Moran* (1887) 5 Dem. 56. The liability of contracts made by guardians or executors is of such a personal character, that even though the contract be signed "as guardian," the guardian is not relieved of personal liability. *Rollins* v. *Marsh* (1880) 128 Mass. 116. The rule holding the guardian personally liable and not allowing his contracts to bind the estate of his ward is based upon a sound rule of public policy. To allow a recovery in quasi-contract would impair the effect of this salutary rule.

DOMESTIC RELATIONS—INFANTS—ELECTION UNDER STATUTE. The Workmen's Compensation Act 60 and 61 Vict., c. 37 gives, to injured workmen the right of electing to draw, during disability, a sum equal to a certain percentage of their wages, or to pursue their common law right of damages for negligence. The plaintiff, an infant, elected to take and receive the percentage during disability. Later he sued to recover damages for negligence. *Held*, the plaintiff was entitled to recover. *Stephens* v. *Dudbridge Iron Works Co.* [1904] 2 K. B. 225.

The defining clause, Sec. 7, sub. 2, defines "workman" as including a person whose "engagement is one of service or apprenticeship." Following the rule of strict construction of statutes in derogation of the common law, the court held that the statute empowered the infant, as a "workman" to make an election, but did not take away his common law rights as to contracts. As to whether or not the contract was on the whole beneficial and binding, Schouler, Domestic Relations, § 421, the case is not distinguishable from *Clements* v. *London & Northwestern Ry.* [1894] 2 Q. B. 482, where an opposite result was reached. The latter case appears to be the better one.

EQUITY—PATENT RIGHTS—CONDITIONS AS TO RESALE OF PATENTED ARTICLES. The plaintiff, a licensee under a patent right, manufactured patented articles, and sold them to a middleman under an agreement stipulating for a minimum selling price. The middleman sold to the defendant, apparently with notice of the restriction. Upon the defendant's selling below the minimum price, the plaintiff sought an injunction to restrain such further sale. *Held*, no injunction would be granted. *McGrouther* v. *Pitcher* [1904] 2 Ch. 306.

The property rights which a patentee or grantee has in the patent and articles made under it, the violation of which rights constitute an infringement, are not possessed by a mere licensee. His rights are purely contractual. The plaintiff in the principal case, therefore, could not in any event recover on the theory of an infringement. 9 Ency. of Laws of Eng. 533; *Heap* v. *Hartley* (1888) 42 Ch. Div. 461; Walker on Patents, § 400; *Paper Bag Cases* (1881) 105 U. S. 766. As against a licensee, his vendees secure rights limited only by contract. *Thomas* v. *Hunt* (1864)

17 C. B. N. S. 183. In the United States the property rights of a grantee or assignee of limited territory are not affected by the unauthorized selling or use in his territory, by a third party, of articles made by a special grantee of the same patent in another territory. *Adams* v. *Burke* (1873) 17 Wall. 453; *Hobbie* v. *Jennison* (1892) 149 U. S. 355; *Keeler* v. *Standard Folding Bed Co.* (1894) 157 U. S. 659. But the courts of both countries have refused to apply this doctrine to imported goods on which there is a domestic patent. *Elmslie* v. *Boursier* (1869) 32 L. J. Ch. 328; *Boesch* v. *Graff* (1889) 133 U. S. 697. The court in the principal case also properly holds, on the authority of *Tweedle* v. *Atkinson* (1861) 1 B. & S. 393, that no recovery can be had on contract, there being no privity between the parties. The stipulation as to price does not follow the goods nor affect title to them, since covenants do not run with goods as with land, *Splidt* v. *Bowles* (1808) 10 East. 279; and conditions cannot be attached to goods so as to follow their sale. 3rd resolution in *Spencer's Case* (1583) 1 Sm. L. C. 115; Pollock on Contracts, 4th ed., p. 224; *Taddy & Co.* v. *Sterious & Co.* [1904] 1 Ch. 354.

EQUITY—TRADE NAME—UNFAIR COMPETITION. The defendant purchased liquid fish glue in bulk from the complainant, bottled and sold it under the following label, "Le Page's Fish Glue." Upon a bill to restrain the use by the defendants of the complainants' trade name, it was *held*, that as the goods sold by the defendant were of the same quality as goods sold by the complainant under its trade name, equity would not restrain the defendant from affixing to them their true name and description. *Russia Cement Co.* v. *Frauenhar* (C. C. A., 2nd Circ. 1904) 32 N. Y. L. J. 475.

The principle upon which the law of unfair competition rests has been expressed as follows: "Nobody has any right to represent his goods as the goods of somebody else." *Reddaway* v. *Banham*, [1896] A. C. 199. Such a representation is a fraud both upon the owner of the trade name and upon the public. *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.* (1891) 138 U. S. 537. So, refilling stamped or labelled packages, bottles or boxes with spurious goods is obviously unfair competition, *Samuel Bros & Co.* v. *Hostetter Co.* (1902) 118 Fed. 257. It is unfair competition to buy worn-out articles, revamp them and sell them under the original name, *General Electric Co.* v. *Re-New Lamp Co.* (1903) 121 Fed. 164, or to sell inferior goods of a manufacturer under labels used by him only for articles of a higher grade. *Russia Cement Co.* v. *Katzenstein* (1901) 109 Fed. 314. But these cases all proceed upon the ground either that the public is likely to be deceived or that the complainant is being defrauded. Hopkins, Unfair Trade, p. 29. Neither of these elements existed in the principal case, and there is no ground for equity's interference. Under similar facts the same result has been reached. *Sweezy* v. *McBriar* (1895) 89 Hun, 155, aff. 157 N. Y. 710; *Kipling* v. *G. P. Putnam's Sons* (1903) 120 Fed. 631. See 3 COLUMBIA LAW REVIEW 494.

EVIDENCE—PRIVILEGE OF WITNESS—SELF-INCRIMINATION. The witness, a co-respondent in a former divorce suit was asked a question as to adultery between him and the respondent. *Held*, he was bound to answer the question. *Evans* v. *Evans & Blyth* [1904] P. 378.

Although by the law of England, adultery is not a crime, *Mordaunt* v. *Moncreiffe* (1874) 2 S. & D. Appeal Cases 374, yet a party committing the offence is liable to ecclesiastical censure and punishment. 2 Burns Eccles. Law, p. 403. "A party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure." *Redfern* v. *Redfern* [1891] P. 139. The punishment of ecclesiastical censure, though obsolete, has never been removed; and since arraignment is so improbable that conduct will not be influenced by apprehension of this fact, the court denies the privilege. *Regina* v. *Boyes* (1861) 1 B. & S. 31. This case seems to be departing from the absolute privilege rule. See 3 COLUMBIA LAW REVIEW 41.

EVIDENCE—PRIVILEGED COMMUNICATION—EFFECT OF DEATH OF PATIENT. A statute provided that all information acquired by a physician from a patient in attending the patient professionally should be privileged. In contesting the probate of a will the contestants attempted to introduce the attending physician of the deceased as a witness to prove that she was insane. *Held*, after the death of the patient the physician's privilege is still in force and cannot be waived by anybody. In re *Hunt's Will* (Wis. 1904) 100 N. W. 874.

At common law communications from a patient to his physician were not privileged; Greenleaf on Evidence, § 247 a; though public policy has dictated the enactment of statutes in some of the states making privileged the information obtained by physicians acting professionally. *Westover* v. *Ins. Co.* (1885) 99 N. Y. 56. For citation of the statutes see Chase's Stephens' Digest of Law of Ev. Art. 117, note. The patient himself may waive the privilege even in the absence of express statutory authority, *Scripps* v. *Foster* (1879) 41 Mich. 742; but there is a conflict as to whether, after the patient's death, the privilege may in his interest be waived by his personal representatives. *Fraser* v. *Jennison* (1879) 42 Mich. 206; *Winters* v. *Winters* (1897) 102 Ia. 53; *Loder* v. *Whelpley* (1888) 111 N. Y. 239. The prevailing view seems to be that the physician cannot testify as to the mental capacity of the deceased patient. *Loder* v. *Whelpley*, supra; *Matter of Coleman* (1888) 111 N. Y. 220; In re *Redfield* (1897) 116 Cal. 637. The case seems sound, for it is impossible to see how the privilege may be waived after the patient's death by others acting in his behalf. *Renihan* v. *Dumin* (1886) 103 N. Y. 573. There may be an express authorization to waive in the statute as is now the case in New York. Code Civ. Proc. § 836. See 4 COLUMBIA LAW REVIEW 438.

PERSONAL PROPERTY—TREASURE TROVE. A tenant of certain lands discovered thereon a quantity of gold-bearing quartz rock unconnected with any natural deposit. There was also evidence of a cloth bag in which it had been buried. In an action by the landlord to secure possession of the quartz, it was *held*, the plaintiff could recover since the subject of the find did not constitute treasure trove belonging to the state or to the finder. *Ferguson* v. *Ray* (Or. 1904) 77 Pac. 600.

In the light of a case decided recently in the jurisdiction of the principal case, this result is surprising. *Danielson* v. *Roberts* (Or. 1904) 74 Pac. 913. Though in the latter case the persons occupying the premises were not the holders of the fee, the case was decided in favor of the finders, presumably, on the theory that the subject of the find was either lost property or treasure trove. The principal case with that variance in the state of facts reasons differently. See 4 COLUMBIA LAW REVIEW 293.

PLEADING AND PRACTICE—CONTEMPTS—APPEALS. Where a person, not a party to a suit in a circuit court of the United States, was adjudged guilty of contempt in violating a restraining order of that court, and was fined for such contempt, it was *held*, that such judgment or order is reviewable in the appropriate circuit court of appeals under the act of March 3, 1891, giving that court appellate jurisdiction of final decisions in all cases other than those for which provision is made for direct review in the supreme court. *Bessette* v. *Conkey Co.* (1904) 194 U. S. 324. See NOTES, p. 54.

PUBLIC SERVICE COMPANIES—MANDAMUS—PETITIONER A WRONGDOER. The plaintiff applied to a telephone company for service. The company having refused to give her the benefit of its service on the ground that the telephone was to be used in a bawdy house, she brought a mandamus to compel it to do so. *Held*, mandamus would not lie, since to allow it would be giving assistance to the petitioner in the criminal act of keeping a bawdy house. *Goodwin* v. *Carolina, etc., Telephone Co.* (N. C. 1904) 48 S. E. 636.

The principal case is to be distinguished from one holding that a railroad company may not refuse to carry a woman because she is a prosti-

tute, *Brown* v. *Memphis, etc., R. Co.* (1880) 5 Fed. 499, and may be assimilated to a case in which it rejects a monte man, who intends to ply his illegal calling on the train, *Thurston* v. *Union Pacific R. Co.* (1877) 4 Dillon's C. C. 321, or in the antebellum days, a fugitive slave. See cases cited in Angell on Carriers, p. 478. In the latter cases the service of the company is invoked in furtherance of the immoral or unlawful action. At any rate, since the remedy of mandamus is discretionary, the court will not compel the respondent to aid an immoral scheme. *Sterrett* v. *Electric etc. Co.* (1887) 3 Pa. Co. Ct. 553.

REAL PROPERTY—INDIAN TITLES BY TREATY—ADVERSE POSSESSION. The United States Government by treaty reserved to the Indians a certain tract of land, reserving to designated individual Indians a fixed portion of such land, to be located subsequently. Later by a patent which restricted the power of alienation the Government defined these portions. *Held*, title passed by the treaty, making the restriction in the patent invalid, so that such restriction would not prevent the claiming of title by adverse possession against the individual Indians. *Francis* v. *Francis* (Mich. 1904) 99 N. W. p. 14.

The view that title passes to the Indians by treaty, *Jones* v. *Meehan* (1899) 175 U. S. 1, though the portions were undetermined, may be supported on the theory that the Indians took as tenants in common in the proportion which the individual shares bore to the entire tract. Washburn on Real Property, 6th ed., § 879; *Benn* v. *Hatcher* (1886) 81 Va. 25; 4 COLUMBIA LAW REVIEW 304. The patent by the government would act as a partition of the land. *Benn* v. *Hatcher*, supra; *Brown* v. *Bailey* (1840) 1 Met. 254; *Coleman* v. *Doe* (1844) 12 Miss. 40. Accordingly, the case seems correct in holding that the Indians' title would be divested by the adverse possession.

REAL PROPERTY—RIPARIAN RIGHTS—USER BY RAILWAY. A railway company's road crossed a natural stream. The company being the owner of the land at the crossing, under a claim of right, inserted a pipe at that point and drew off water to supply a tank half a mile away. From this tank it supplied water to its locomotives. The defendant, a lower proprietor, obstructed the flow in the pipe and the plaintiff sought to enjoin such interference. The defendant's flow was not materially altered. *Held*, that since the plaintiff's user was unlawful the injunction would be denied. *McCartney* v. *Londonderry etc. R. Co.* [1904] A. C. 301.

The question whether a railway can draw water from a stream, on which it is a riparian owner, and use the water to supply its locomotives, has arisen twice before in England. In *Attorney General* v. *Gt. Eastern R. Co.* (1871) L. R. 6 Ch. App. 572, the railway company was restrained, but the case was complicated by other facts. In *Earl of Sandwich* v. *Gt. North. Ry. Co.* (1878) L. R. 10 Ch. Div. 707 BACON V C. held that the railway could take a reasonable quantity. The present decision by the House of Lords holds that no such user can be reasonable. Riparian rights are inherent in the land bordering upon the stream, and a riparian owner can not use the water for purposes unconnected with his riparian land, without infringing the right of a lower proprietor to all the water not used by the upper proprietor for purposes strictly connected with his land. *Swindon Waterworks Co.* v. *Wilts & Berks Canal Co.* (1875) L. R. 7 H. L. 697. Hence riparian rights cannot be assigned. See 4 COLUMBIA LAW REVIEW 431. Infringement of this right is actionable without proof of injury because it legally imports damage, *Blodgett* v. *Stone* (1880) 60 N. H. 167, otherwise, the railway would in time acquire a prescriptive right This fact seems to be lost sight of in Massachusetts. *Elliott* v. *Fitchburg Ry. Co.* (1852) 10 Cush. 191. The weight of authority in this country is in accord with the principal case. *Clark* v. *Penna. R. Co.* (1891) 145 Pa. St. 438; *Garwood* v. *N. Y. Central Ry. Co.* (1881) 83 N. Y. 400.

SURETYSHIP—CLAIM AGAINST PRINCIPAL BARRED BY STATUTE OF LIMITATIONS—REMEDY AGAINST SURETY. The plaintiff was the holder of a

promissory note against which as to the principal the statute of limitations had run. The surety having died, the statute was suspended for a certain period as to his estate. At the close of this period suit was brought against the administrator. *Held*, that although the remedy against the principal was barred by the statute, nevertheless the estate of the surety was bound. *Charbonneau* v. *Bouvelt* (Tex. 1904) 82 S. W. 460.

When the principal is released by operation of law, the surety is nevertheless bound. *Cragoe* v. *Jones* (1873) L. R. 8 Exch. 81. This idea inheres in the contract by the surety with the creditor, which is immediate, direct and absolute. Stearns on Suretyship, § 6. Moreover, the surety who has paid a debt barred by the statute may recover against the principal. *Godfrey* v. *Rice* (1871) 59 Me. 308. Such a recovery is allowed, not on any principle of subrogation to the creditor's rights, but upon the implied promise which exists by law between the principal and surety in such cases. *Faires* v. *Cockerell* (1897) 88 Tex. 428.

TAXATION—CORPORATE FRANCHISE TAX—INTERPRETATION OF STATUTE. A franchise tax had been imposed upon a corporation, composed only of tenants in common of unimproved real estate, organized to pay off mortgages and back taxes and hold the property until a sufficient amount might be realized thereupon to give the members something on their interests. The corporation appealed from an order affirming the assessment. *Held*, the capital invested was not employed within the state within the meaning of the statute and the tax was therefore invalid. *People* v. *Ft. George Realty Co.* (1904) 179 N. Y. 49.

The statute in the principal case, though it grants no exception to a corporation conducting a going business, even upon failure to realize dividends, appears to be aimed only at corporations organized with that end in view, and not at corporations, the essential purpose of whose incorporation is the convenience of the corporate existence for holding of title to real estate. General Laws of N.Y. 1896, c. 908, § 182. A distinction is made between capital employed and invested, and taken as a whole, the statute would seem to justify this distinction. New York makes no distinction between a domestic and a foreign corporation in this regard. *People* ex rel. *Singer Mfg. Co.* v. *Wemple* (1896) 150 N. Y. 46. But few states have developed a general corporation tax system and the authorities on the subject are consequently limited. Seligman's Essays on Taxation, p. 170.

TAXATION—MORTGAGES—DOUBLE TAXATION. A resident of New York owned promissory notes payable in Ohio and secured by mortgages on land in that State. The notes and mortgages were kept by an agent in Indiana permanently, except for the time when each year they were sent to Ohio for the purpose of having the annual payments endorsed on the notes. *Held*, the notes were taxable in Indiana. *Buck* v. *Beach* (Ind. 1904) 71 N. E. 963. See NOTES, p. 50.

TAXATION—PAYMENT UNDER UNCONSTITUTIONAL LAW—INTEREST. The petitioner paid a transfer tax on a vested remainder which she had acquired. The law under which the tax was collected having been held unconstitutional, the petitioner sues to have her money refunded with interest. A statute provided for the refunding of taxes under the situation above stated, but was silent as to interest. *Held*, the State having provided by statute for the refunding of taxes collected under an unconstitutional law, the right to collect interest follows, even though not expressly so declared. *Matter of O'Berry* (1904) 179 N. Y. 285.

The rule is that taxes do not draw interest unless interest is expressly allowed by statute. Cooley on Taxation, 3rd ed. pp. 20, 1487. At first glance, the principal case in allowing interest would seem to be at variance with this rule. The variance is apparent, however, rather than real; for money collected as a tax, under an unconstitutional statute, is really no tax at all. There was no right to take the money, but since it was taken, it must be regarded as money had and received to the plaintiff's use, and

interest can thus be allowed without conflicting with any doctrine of taxation. Another requisite for the recovery of taxes paid is that payment should have been involuntary. *Odendahl* v. *Board* (1900) 112 Ia. 182. This is usually taken to mean that the tax must be paid under some threatened seizure of person or property. *Town of Edinburg* v. *Hackney* (1876) 54 Ind. 83. The principal case is liberal in its interpretation of what is an involuntary payment.

TORTS—NEGLIGENCE—LIABILITY TO THIRD PERSONS FOR INJURIES RESULTING FROM BREACH OF CONTRACT. A engaged B to put an elevator in complete repair. In so doing B's men negligently cracked an overhead brake wheel. C, an employee of A, was injured by a piece of this wheel falling upon him and brought an action against B. *Held*, where a machine, not inherently dangerous, is made so by the neglect of a manufacturer, knowing that it is to be used by third parties, he is liable for injuries directly traceable to such negligence. *Kahner* v. *Otis Elev. Co.* (1904) 89 N. Y. Supp. 185.

The above rule seems to clearly overturn the doctrine advanced by *Knelling* v. *Roderick L. M. Co.* (1903) 84 N. Y. Supp. 622, and is in marked contrast with a recent federal decision which adheres to the old English rule. *Galbraith* v. *Ill. Steel Co.* (C. C. A. 7th Circ. 1904) No. 1046. Here the owner of a building was not allowed to recover against a sub-contractor for damage resulting from the latter's failure to put certain braces into a steel support for a large tank on the roof, although the plans and specifications called for such braces. According to the old rule, privity between the plaintiff and the defendant was made an essential of liability in such cases on the ground of the expediency of discouraging endless litigation. *Winterbottom* v. *Wright* (1842) 10 M. & W. 109. While this general principle is still recognized, it has been greatly impaired by successive exceptions. *Huset* v. *J. I. Case Threshing Co.* (1903) 120 Fed. 865. See 2 COLUMBIA LAW REVIEW, 105; 4 id. 144.

WILLS—BENEFICIARY CLAIMING ADVERSELY—ELECTION. A widow received, by her husband's will $100 and a life estate in realty valued at $500, remainder to her son subject to certain charges. The title to the realty was not in testator, but absolutely in the widow. However, she probated the will and qualified as administratrix with the will annexed. In her application she set forth the value of her husband's estate, including therein the realty. She was entitled by statute to one year's widow's support which would have exceeded $100. She retained the $100 and remained on the land uutil her death. Upon petition by the plaintiff, as executor under her will, in which no mention of the land was made, for license to sell the realty, it was *held*, by accepting the gift of $100 under the will she and her representatives were estopped to claim the land adversely to the will. *Tripp* v. *Nobles* (N. C. 1904) 48 S. E. 675.

Whether a devisee, by probating a will and qualifying as executor is estopped to claim adversely to it is in conflict. Gardner on Wills, p. 602 and cases cited. However, as it is a question of implied intention the fact that the executrix in the principal case set forth the land as part of her husband's estate, and did not mention it in her own will, would seem to be strong evidence of her election. The dissenting opinion proceeded on the ground that she had received no alternative benefit under the will since she was already entitled to more than $100 as her year's support. *Godman* v. *Converse* (1894) 38 Neb. 657. The better view is that the doctrine of election is based on the equitable notion of compensation. Underhill Law of Wills, § 729; Pomeroy Eq. Jur. § 468; *Young* v. *Young* (1893) 51 N. J. Eq. 491. A donee who elects to take under a will does not forfeit all his own property which the testator has attempted to give to another, but must compensate the disappointed donee. *Brown* v. *Brown* (1890) 42 Minn. 270; Underhill on the Law of Wills, § 729. In the principal case the widow was entitled to claim adversely to the will and yet receive $100 as her year's support. *Compher* v. *Compher* (1855) 25 Pa. St. 31; *Stone* v. *Vandermark* (1893) 146 Ill. 312. Unless, after the lapse of time, the rights of third parties had intervened, the dissenting opinion seems preferable.